



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. PD-0365-16 & PD-0366-16

MICHAEL JOSEPH BIEN, Appellant

v.

THE STATE OF TEXAS

ON STATE'S AND APPELLANT'S PETITIONS FOR DISCRETIONARY REVIEW
FROM THE ELEVENTH COURT OF APPEALS
BROWN COUNTY

YEARY, J., filed a dissenting opinion.

DISSENTING OPINION

When the same act or conduct violates more than one statutorily defined penal offense, in order to determine whether punishment for both statutorily defined offenses violates double jeopardy, we have said that an “elements” analysis is appropriate.¹ This is the so-called *Blockburger*/cognate-pleadings approach to double jeopardy analysis, upon which we expounded at length several years back in *Ex parte Benson*, 459 S.W.3d 67, 72 (Tex.

¹ See *Blockburger v. United States*, 284 U.S. 299 (1932); *Hall v. State*, 225 S.W.3d 524, 532-33 & n.39 (Tex. Crim. App. 2007).

Crim. App. 2015). In this case, both indictments alleged that, “on or about the 7th day of December, 2012,” Appellant committed certain conduct in recruiting Stephen Reynolds to commit murder for remuneration. Thus, on their faces, the indictments *seem* to allege that the same act or conduct simultaneously violated both the Penal Code proscription against criminal solicitation of capital murder and the separate Penal Code proscription against criminal attempt to commit capital murder.² It is therefore understandable that both the court of appeals,³ and now this Court,⁴ have approached the question as simply a matter of whether, under *Benson*’s “elements” approach, Appellant could be punished for both of these statutorily defined offenses without violating double jeopardy protections.

But the double jeopardy analysis in this case does not end there. Here, the evidence shows that Appellant engaged in conduct on *two* discrete occasions whereby he approached Stephen Reynolds in an attempt to engage him to commit murder for remuneration: first on December 1, 2012 (which was “on or about the 7th of December, 2012”),⁵ and then again on December 7, 2012. It is at least arguable that the double jeopardy issue in this case is not

² See TEX. PENAL CODE §§ 15.03(a) (criminal solicitation) & 15.01(a) (criminal attempt), respectively.

³ *Bien v. State*, 530 S.W.3d 177, 181-83 (Tex. App.—Eastland 2016).

⁴ Majority Opinion at 8-13.

⁵ See *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997) (“It is well settled that the ‘on or about’ language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitation period.”).

fully governed by the *Blockburger*/cognate pleadings “elements” approach; that there is a “units of prosecution” component to the double jeopardy analysis that must be addressed as well.⁶ “When two distinct statutory provisions are at issue, the offenses must be considered the same under both an ‘elements’ analysis and a ‘units [of prosecution]’ analysis for a double jeopardy violation to occur.” *Benson*, 459 S.W.3d at 71. A jury in this case might rationally have found that Appellant committed criminal solicitation of capital murder, during his December 1st meeting with Reynolds, and also that he separately committed the offense of attempted capital murder when, on December 7th, he made a down payment for services rendered and obtained a commitment from Reynolds to carry out the offense. I do not think the double jeopardy issue is fully resolved until this possibility is explored.

For that reason, the Court errs to affirm the judgment of the court of appeals on an “elements” analysis alone. I would remand the cause for the court of appeals to conduct a

⁶ In *Benson*, we observed:

Even when the offenses in question are prescribed by a single statute *or are otherwise the same under an “elements” analysis*, the protection against double jeopardy is not violated if the offenses constitute separate allowable units of prosecution. This latter inquiry involves determining such things as whether there were two murder victims, *whether a victim who was assaulted on Monday was assaulted again on Tuesday*, or whether multiple kinds of sex acts were committed against a victim. A “units” analysis consists of two parts: (1) what the allowable units of prosecution is, and (2) *how many units have been shown*. The first part of the analysis is purely a question of statutory construction and generally requires ascertaining the focus or gravamen of the offense. *The second part requires an examination of the trial record, which can include the evidence presented at trial.*

459 S.W.3d at 73-74 (emphasis added).

“units of prosecution” analysis. Because the parties have yet to brief that facet of the double jeopardy analysis, I would invite the court of appeals to solicit additional briefing. Instead, the Court simply affirms the lower court’s judgment, to which I respectfully dissent.

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